FILE COPY

NOV 18

No. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*

v.

MINNESOTA TEA COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE

J. S. Y. IVINS,
Amicus Curiae
c/o Brewster, Ivins & Phillips,
805 15th Street, N. W.,
Washington, D. C.

COMPARISON OF REORGA

1 Title of Case	2 S. Ct. No.	3 Acquiring Party	4 What Acquired	5 From Whom Acquired	6 Consideration Given	7 What Done With Consideration	A T
Helvering v. *Minnesota Tea Co.*	174	Corp. A (Grand Union Company)	All *assets* of Corp. B (Minnesota Tea Co.)	*Corp.* B.	Voting trust ctfs for 18,000 common stock of A plus cash.	A stock held by B Corp. Cash distributed to B's stockholders who assumed B's liabilities.	
John A. Nelson Co. v. *Helvering*	61	Corp. A (Sundstrand Corporation of Delaware) created for purpose of acquiring A's assets.	Substantially all *assets* of Corp. B (John A. Nelson Co., formerly called Sundstrand Corporation—an Illinois corporation) i.e., all but $100,000 cash constituting less than 3% of assets.	*Corp.* B.	All of A's preferred stock plus cash.	Stock and cash distributed forthwith among B's stockholders.	
Helvering v. *Watts*	184	Corp. A (Vanadium)	All *stock* of Corp. B. (Ferro Alloys)	Respondents (*Stockholders* of B).	32,103* shares A stock plus 161,184.50 in bonds of B guaranteed by A.	Respondents continued to hold stock and bonds received.	
Helvering v. *Sicard*	185						
Helvering v. *Sloane*	186						
The G & K Mfg. Co. v. *Commissioner*	187	Corp. A (Kraft Phenix Cheese Corp.)	All *assets* of Corp. B (Gelfand Mfg. Co.)	*Corp.* B. (Gelfand Mfg. Co.—name later changed to G & K Mfg. Co.)	17,250 shares common stock of A (with restriction on sale) plus cash.	A stock held by B Co.—later exchanged for debentures and stock of a successor to A.	

* Number finally settled 1/1/1926 under agreement of 12/6/1924.

8 Against Whom Tax Asserted	9 What Became of Corporations	10 Applicable Statory Provision	11 Decision Below
Corp. B.	Both continued.	Rev. Act 1928 § 112(i): 1) The term 'reorganization' means (A) a merger or nsolidation (including the acquisition by one corporati of * * * *substantially all the properties* of another corration)."	C.C.A. 8. 76 F. (2d) 797. Held: Transaction a "reorganization."
Corp. B.	Resolution called for dissolution of Corp. B.	Rev. Act 1926 § 203(h) () A: "The term 'reorganization' means (A) a mergeor consolidation (including the acquisition by one corportion of * * * *substantially all the properties* of another orporation). Also § 203(b) (3), § 203(e) (1)."	C.C.A. 7. 75 F. (2d) 696. Held: Transaction not a reorganization within meaning of statute.
Respondents	B continued through 1925 to determine earning power for computation of consideration to be given. A caused dissolution of B in 1927-1928.	Rev. Act 1924 § 203(h): '(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least *a majority of the voting stock* and at least a majority of the total number of shares of all other classes of stock of another corporation * * *)."	C.C.A. 2. 75 F. (2d) 981. Held: Transaction a "reorganization," and bonds to be "securities."
Corp. B.	Both Corps continued.	Rev. Act 1928 § 112(i): "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of * * * *substantially all the properties* of another corporation)."	C.C.A. 4. 76 F. (2d) 454. Held: No "reorganization."

INDEX

	Page
Motion for Leave to File Brief as Amicus Curiae	1
Brief	2
I. Historical origin of the confusion in interpretation of the reorganization provisions of the statutes	2
II. Meaning of "Securities"	9
Appendix	11

CASES CITED

Cortland Specialty Co. v. Commissioner, 22 B.T.A. 808, affirmed 60 Fed. (2d) 937 ..... 3, 4, 5, 8, 10

Pinellas Ice & Cold Storage Co. v. Commissioner, 21 B.T.A. 425, 57 Fed. (2d) 188, 287 U. S. 462 ..... 3, 4, 5, 7

Sarther Grocery Co. v. Commissioner, 22 B.T.A. 1273, affirmed 63 Fed. (2d) 68 3

Snyder v. Massachusetts, 291 U. S. 97 6

Worcester Salt Co. v. Commissioner, 75 Fed. (2d) 251 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*

v.

MINNESOTA TEA COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned, attorney for several taxpayers interested in the correct interpretation of section 112(i) of the Revenue Act of 1928, and similar statutes, respectfully moves this Court for leave to file the subjoined brief as a friend of the Court. Counsel for both parties have given their consent.

J. S. Y. Ivins.

November 18, 1935.

BRIEF

I.

HISTORICAL ORIGIN OF THE CONFUSION IN INTERPRETATION OF THE REORGANIZATION PROVISIONS OF THE STATUTES.

The history of the statutory provisions under consideration in the four reorganization cases (No. 174, *Helvering* v. *Minnesota Tea Co.;* No. 61, *John A. Nelson Co.* v. *Helvering;* No. 184, *Helvering* v. *Watts,* etc.; No. 187, *G & K Mfg. Co.* v. *Commissioner)* and the history of the departmental construction of those cases has been covered in detail in several of the briefs filed by counsel for taxpayers. (See particularly the brief for the respondent in the *Minnesota Tea Co.* case, brief of Edward H. Green, as amicus curiae in the *Watts* case, No. 184, and the brief for the respondent in that case.)

The various decisions of the courts and the Board of Tax Appeals have been discussed at some length in all the briefs in all the cases, but it is thought that a brief reference to them in chronological order may shed some light that will be of assistance to the court.

Prior to 1930, it appears to have been assumed by everybody that when the statute defined reorganization as including the acquisition by one corporation of substantially all the assets of another or of the majority of the voting stock and the majority of all other classes of stock of another corporation, it meant what it said. The definition was an arbitrary one, put in the statute for the purpose of constituting a step in the process of determining when gain or loss should be recognized in respect to certain types of transactions. The danger that taxpayers might claim that gain on their transactions was not to be recognized, even in cases where the acquisition

mentioned above was by purchase rather than by exchange, was taken care of in other sections of the statute—which avoided recognition of gain only in cases of *exchange* for stock or securities. If there was no exchange for stock or securities, gain in the transaction was taxable whether or not there was any "reorganization" within the arbitrary statutory definition.

The first disputes arose over the meanings of "sale," "exchange" and "securities" and not with respect to the meaning of "reorganization," "merger" or "consolidation." In *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 21 B.T.A. 425, decided by the Board of Tax Appeals on November 24, 1930, *Cortland Specialty Co.* v. *Commissioner,* 22 B.T.A. 808, decided March 19, 1931, and *Sarther Grocery Co.* v. *Commissioner,* 22 B.T.A. 1273,[1] decided April 22, 1931, the Board of Tax Appeals upheld the Commissioner of Internal Revenue in his rulings that the transactions considered were "sales" and not exchanges for stock or securities. The *Pinellas* case and the *Cortland* case involved transactions wherein the consideration consisted of cash and some short-term notes. In the *Sarther* case, the consideration was only cash. The Board held, in each instance, that there was a sale. It commented in the *Pinellas* case that there was no necessity for passing on the meaning of "reorganization." In the *Cortland* case, the Board discussed the meaning of "reorganization" and indicated that a true sale could not be regarded as a reorganization, consolidation or merger. This discussion was really obiter since the decision rested entirely on the holding that the short-term notes should not be considered "securities." In the *Sarther* case, the Board based its opinion entirely upon the meanings of "sale" and "exchange", and cited the *Pinellas* case.

---

[1]Affirmed 63 Fed. (2d) 68, C.C.A. 7.

When the *Pinellas* case reached the Circuit Court of Appeals for the Fifth Circuit,[2] that court departed from the *ratio decidendi* of the Board of Tax Appeals and based its opinion on the proposition that to be a reorganization within the meaning of the statute there had to be a merger or a consolidation. While the *Pinellas* case was under consideration in the Fifth Circuit, the *Cortland Specialty Co.* case went to the Circuit Court of Appeals for the Second Circuit, where the decision of the Board was affirmed[3] on the ground that the transaction was a sale and not an exchange for securities. In its opinion, the Circuit Court of Appeals said that the provisions which postponed discussion of gain in cases of exchanges under reorganizations, contemplated a "continuity of interest", and that the short-term notes received by the seller did not give it a continuity of interest in the business which had been sold. It would seem that the court was not concerned (it had no reason to be) with the ratio of the seller's interest to the total investment in the properties and obligations of the purchasing company. What the Circuit Court had in mind seems rather to have been that to obtain the benefit of the statute a party, whose stock or assets were turned over to another company, should have some or all of his consideration in the form of an investment *at the risk of the continuing business.* This would be consistent with the Congressional intent as reflected in the legislative history of the statutes.

This Court denied certiorari in the *Cortland Specialty Co.* case, but it reviewed the *Pinellas* case[4] and held that the transaction had been a sale, that the Circuit Court of Appeals was in error in giving no meaning whatever to

---

[2]57 Fed. (2) 188.
[3]60 Fed. (2) 937.
[4]287 U. S. 462.

the words embraced in parentheses in the statutory definition of "reorganization", and that there should be a "continuity of interest". This Court cited the *Cortland Specialty Co.* case and presumably had in mind the same thought which we submit must have been in the mind of the Circuit Court of Appeals—that a continuity of interest meant keeping an investment at the risk of the business.

This Court, however, in the *Pinellas* case, did say that to be a reorganization, even if not a merger or consolidation, a transfer should partake of the nature of a merger or consolidation. To what extent the assimilation should go was not stated by the Court. The Court certainly did not indicate that it would not regard as resembling a merger or consolidation the acquisition by one corporation of enough of the stock of the other to render them "affiliated" within the meaning of the statutory provisions for filing consolidated returns,[5] nor did it indicate that it would not regard as resembling a merger or consolidation the acquisition by one corporation of all the assets of another when the stockholders of the second company continued all or part of their investment at the risk of the business of the acquiring company, either through becoming stockholders or long-term bondholders thereof.

So far, all the litigated cases had dealt entirely with situations that were held by the Commissioner, the Board of Tax Appeals and the Courts to have been sales and not exchanges, the consideration in every instance being either all cash or involving notes of such short terms that they were regarded as the equivalent of cash rather than "securities," and which notes certainly did not contem-

---

[5]Cf. Reg. 45 (1920 edition), art. 1567, which holds "reorganization" to include the acquisition by one corporation of enough stock of another to render them affiliated.

plate any protracted continuation of an investment of the selling company at the risk of the business of the purchasing company.

The next case to be litigated was that of the *Minnesota Tea Co.* In that case, *the assets of the Minnesota Tea Co.* were transferred to the Grand Union Co. in exchange for voting trust certificates representing 18,000 shares of the common stock of the Grand Union Co. plus some cash. The Minnesota Tea Co. distributed the cash among its stockholders but continued as a holding company owning the beneficial interest in 18,000 shares of the Grand Union Co. It thus clearly had a very substantial amount of its capital invested at the risk of the business of the Grand Union Co. and clearly had "a continuity of interest."

The Board of Tax Appeals fell into the type of error the danger of which Mr. Justice Cardozo pointed out in *Snyder* v. *Massachusetts.*[6]

The Board initiated the process of construing constructions and assumed that when the courts had referred to "continuity of interest", they had in mind the thought that to constitute such a continuity the investment must continue to be an investment in the old assets (undiluted

---

[6] "'A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.'" (291 U. S. 97, 114.)

The Justice was discussing construction of the Constitution but his statement is equally applicable to construction of statutes.

by the other assets of the acquiring company), rather than an interest in the continuing corporation. The Board also assumed that clause "(A)" of the statute must be read in the light of clause "(B)", overlooking the fact that clause "(A)" was carried forward from a preceding statute and clause "(B)" was added with the express intent of taking care of a type of cases not covered by clause "(A)" in the earlier law.

Although the Commissioner of Internal Revenue had held that the transaction was a reorganization, and the case had been presented to the Board by both parties on that theory, the Board, of its own motion, raised the question and held that there was no reorganization within the meaning of the statute.

It is interesting to note that among the dissents from Mr. Sternhagen's opinion in the *Pinellas* case was one by Mr. Van Fossan who decided the *Watts* case, and that Mr. Sternhagen disagreed with the *ratio decidendi* in the *Watts* case.

While the Board's opinion in the *Minnesota Tea Co.* case was being prepared, another division of the Board decided the *John A. Nelson Co.* case. Although the Illinois corporation transferred all its assets except $100,000 cash (which constituted less than three per cent of its assets) to the Delaware corporation for all of the latter's preferred stock plus some cash, and although the parties stipulated before the Board that this transaction constituted a reorganization within the meaning of the statute, the Board rejected the stipulation and held that there was no reorganization because the petitioner did not transfer all its stock, nor come within the provisions of clause "B" of the statute by acquiring a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of the Delaware corporation. The

Board stressed the fact that in the agreement between the companies the words "sale and transfer" were used, but overlooked the fact that in the corporate resolutions the word "reorganization" was also used.

The *Watts* case involved a transaction coming under the second part of the parenthetical matter of the statute. The Vanadium Co. acquired all the stock of the Ferro Alloys Corporation, and the stockholders of the Ferro Alloys Corporation received in exchange therefor certain stock of the Vanadium Co. and bonds of the Ferro Alloys Corporation guaranteed by the Vanadium Co. The Board seized upon some phraseology from the *Cortland Specialty Co.* decision of the Circuit Court of Appeals, which had been written with respect to an entirely different situation, and fitting it to the problem before it, held that there was no reorganization because there was no new or modified corporate structure, the corporate structure of the Vanadium Co. continuing unchanged. The Board, of course, overlooked the fact that the corporate structure of the Vanadium Co. *was* substantially changed in the process of its becoming a holding company—holding the stock of Ferro Alloys Corporation, which continued to operate as a subsidiary. The Circuit Court of Appeals, in referring to new or modified corporate structure, was referring to the necessity of continuity of investment, not to the necessity of a change in corporate structure. But the Board, in its effort to interpret interpretations, entirely lost sight of the language of the statute it was construing. In the same manner, the Board wrote into the statute a necessity for a dissolution of the acquiring company—which Congress never contemplated, as is pointed out in several of the other briefs before this Court.

The *G & K Mfg. Co.* case was decided on April 16, 1934, in an unpublished memorandum. (R. 49, No. 187.)

In that case, all of the asets of the Gelfand Mfg. Co. were transferred to the Kraft-Phenix Cheese Corporation for 17,250 shares of the common stock of the latter plus certain cash. The Board thought that because it could not determine the extent of the continuing interest (apparently thinking of interest as control rather than as investment at risk of the business), and because neither corporation was dissolved, the case came within its decision in the *Minnesota Tea Co.* case, and held that there was no reorganization.

The four Board decisions were taken to four different Circuit Courts of Appeals. In the *Minnesota Tea Co.* case (Eighth Circuit) and the *Watts* case (Second Circuit), the Circuit Courts of Appeals reversed the Board and held that the statute meant what it said. In the *Nelson* case (Seventh Circuit) and the *G & K Mfg. Co.* case (Fourth Circuit), the Circuit Courts of Appeals continued the process of interpreting interpretations. The other briefs on file in the various cases discuss these opinions at such length that we will not burden this Court with further reference to them.

II.

MEANING OF "SECURITIES".

Certainly, when Congress wrote into the statute "stock or securities" it meant more than "stock or stock rights". It is submitted that "securities" was used in the ordinary meaning of the term and included bonds, debentures, long-term collateral notes and other obligations of the nature that are ordinarily classified by accountants among fixed liabilities, as distinguished from current liabilities on the part of the obligor, and which are regarded as investments, rather than the equivalent

of cash, on the part of the obligees. This distinction reconciles the decision of the Circuit Court of Appeals for the Second Circuit in the *Cortland Specialty Co.* case with its decision in the *Watts* case. In the former, the obligations involved were a series of short-term notes; in the latter, (in addition to stock) they consisted of a block of mortgage bonds of Ferro Alloys Corporation guaranteed by the Vanadium Co.

There is an apparent conflict between the decision of the Circuit Court of Appeals for the Second Circuit in *Worcester Salt Co.*, 75 Fed. (2) 251, and its decision in the *Watts* case on the clasification of bonds. After the opinion was rendered in the *Watts* case, the Government moved for a reconsideration on the ground of this conflict and the motion was denied. The net effect of the action of the court in denying the motion was to overrule its earlier decision in the *Worcester Salt* case in so far as it was in conflict with the *Watts* case.

There is no reason why Congress should be presumed to have meant by the word "securities" in the reorganization sections of the statutes, something different from what it meant when it used the word "securities" in other parts of the Revenue Acts or in other statutes, or something different from what the Treasury Department has meant by "securities" in its regulations and rulings. In the Appendix are listed a number of places where the word "securities" will be found in other parts of the Revenue Acts, in Treasury Regulations and rulings, and in other Federal statutes, in such a way that there can be no question that it was intended to include corporation bonds.

Respectfully submitted,

Of Counsel:
BREWSTER, IVINS & PHILLIPS.

J. S. Y. IVINS,
Amicus Curiae.

APPENDIX

Provisions (other than the provisions under consideration in the reorganization cases) of Revenue Acts where the word "securities" is used—obviously including bonds of corporations:

Revenue Act of 1917, section 1200, amending Revenue Act of 1916, section 4: "securities issued under the provisions of the Federal Farm Loan Act."

Similarly, Revenue Acts of 1918, 1921, 1924 and 1926, section 213(b) (4); Revenue Acts of 1928 and 1932, section 22(b) (4); Revenue Acts of 1924 and 1926, section 204(a) (11), dealing with property received in place of stock or "securities".

Similarly, Revenue Acts of 1928 and 1932, section 113 (a) (11), and Revenue Act of 1934, section 113(a) (10). Revenue Acts of 1921, 1924 and 1926, section 214(a) (5), section 234(a) (4), dealing with wash sales of stock or securities. Similarly, Revenue Acts of 1928, 1932 and 1934, section 118.

Treasury Regulations (other than those dealing with exchanges on reorganization) where the word "securities" is used—obviously including bonds of corporations:

Regulations 45 (1918 law), article 154: "*Worthless Securities.*—Where bonds purchased before 1913 depreciated in value * * *."

Similarly, in Regulations 62 (1921), Regulations 65 (1924), Regulations 69 (1926)—article 154, the same language is used, and later, "A taxpayer (other than a dealer in securities) possessing debts evidenced by bonds or other similar obligations * * *."

Similarly, Regulations 74 (1928), Regulations 77 (1932), article 194; Regulations 86 (1934), article 23 (k)-4.

Regulations 62, article 147: "Losses from the sale and repurchase of securities.—An individual, other than one in the trade or business of buying and selling securities, cannot deduct any loss claimed to have been sustained from the sale or other disposition of stock or securities, if within thirty days before or after the date of such sale or other disposition he has acquired * * * substantially identical property."

Similarly, Regulations 65 and Regulations 69, article 146; Regulations 74, article 661. Also Regulations 77, article 661, where title is changed to: "Losses from Wash Sales of Stocks or Securities." Regulations 86, article 118-1, also Regulations 65 and 69, article 1601; Regulations 74 and 77, article 602.

Regulations 33, Revised (1916-17), article 4, paragraph 27, dealing with dividends paid with securities.

Treasury Rulings in which bonds are treated as "securities":

I. T. 1356, I-1 C. B. 151, holding Liberty bonds within statutory provision respecting wash sales of securities, says: "Important features of securities are their earning power or interest rate * * * in the case of bonds, the date of maturity."

I. T. 1239, I-1 C. B. 149, held that profit on sale of Liberty bonds was taxable as profit "derived from the sale of securities."

Federal statutes, other than Revenue Acts, where the word "securities" is used in a sense obviously including bonds:

U. S. Code, section 303b: "The term 'securities' shall include bonds, notes, and other evidence of indebtedness * * *." (Bankruptcy.)

U. S. Code, Title 12, sections 377 and 378: "• • • stocks, bonds, debentures, notes, or other securities • • •." (Banking.)

U. S. Code, Title 12, section 615a: "• • • securities, including the obligations of the United States or of any state." (Obligations of the United States or of any State.)

U. S. Code, Title 15, section 77b, defining securities, and section 78c, 78t(c) and 78dd, applying definition. (Securities Act of 1933.)

U. S. Code, Title 18, section 262: "obligation or other security of the United States." (Criminal Code.)

U. S. Code, Title 18, section 270: "Any bond, certificate, obligation or other security of any foreign government." (Criminal Code.)

U. S. Code, Title 18, section 414. A very broad definition of "securities" in criminal code.

U. S. Code, Title 47, section 212, prohibiting officials of telephone and telegraph companies from benefiting from the sale of "any securities issued or to be issued" by their companies.

U. S. Code, Title 49, section 19a, defining powers of Interstate Commerce Commission to investigate "increases or decreases of stock, bonds or other securities in any reorganization" of interstate carriers.

U. S. Code, Title 49, section 20a(2): "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the owner (hereinafter in this section collectively termed 'securities') • • •."